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No. 87-2058

In The

Supreme Court of the United States

October Term, 1987

CORNHUSKER CHRISTIAN CHILDRENS HOME, INC.,
A Nebraska Nonprofit Corporation,

Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

REPLY BRIEF

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I.

CORNHUSKER'S FORCED COMPLIANCE WITH REGULATION 6-005.26K IS A COGNIZABLE, PERSONAL INJURY TO CORNHUSKER THAT GIVES IT STANDING TO SEEK RESOLUTION OF ITS DISPOSITIVE FEDERAL CLAIMS IN ITS OWN RIGHT AND TO RAISE THE CONCOMMITANT INJURY CAUSED TO NATURAL PARENTS WHO PLACED CHILDREN WITH CORNHUSKER

The substantive constitutional questions in this appeal center on the infringement by the Nebraska Department of Social Services (DSS) of the rights of both Cornhusker and natural parents to discipline children. Cornhusker has complied with Regulation 6-005.26K expressly and only to avoid license revocation. It brought this lawsuit to avoid continued compliance.

Cornhusker's injury thus is actual, continuing, and a direct consequence of the "putatively illegal" regulation adopted by the DSS. *Warth v. Seldin,* 422 U.S. 490 (1975). Article III standing requires no more. *Id.*

Regulation 6-005.2K, moreover, is directed at and acts directly on Cornhusker. Since Cornhusker's injury is to its own legal and constitutional rights and is more than a general grievance, federal court prudential justiciability concerns similarly are met. *Id.*

As this Court repeatedly has held, standing is and must be determined without regard to the merits of the substantive claim under dispute. *Id.* at 500. Respondent nonetheless misperceives not only the merits of Cornhusker's constitutional claim but, more to the point here, this Court's clear articulation of the components of standing. Respondent first concludes that Cornhusker has no fourteenth amendment liberty interest—a conclusion that can be reached only by evaluating the substantive merits of Cornhusker's claim—and then argues back to a conclusion that Cornhusker lacks standing to raise any such claim. This misconception of standing permeates and infects Respondent's entire argument on this point. It also is an ex-

trapolation of why the Nebraska Supreme Court refused review that directly flouts the reasons given by the court itself. Nebraska Supreme Court Order Denying Appellee's Motion to Certify a Federal Question (Juris. Statement, App. 39).

Since Cornhusker has standing in its own right to challenge the constitutionality of the DSS regulation, it also has standing to raise "those concomitant rights" of natural parents placing children with Cornhusker—parental rights that would be "diluted or adversely affected" should Cornhusker's challenge fail. *Craig v. Boren,* 429 U.S. 190 (1976) (seller asserting rights of minor precluded from buying beer); *Griswold v. Connecticut,* 381 U.S. 479 (1974) (doctor and others asserting rights of married couples). *See Truax v. Raich,* 239 U.S. 33 (1915) (employee asserting employer's rights); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (private school asserting rights of parents and pupils). In any event, restrictions on a litigant's right in federal court to raise the interests of third parties are prudential, not mandated by Article III. *E.g., Barrows v. Jackson,* 346 U.S. 249 (1953). By contrast to a decision of non-justiciability in a case begun in a federal district court (where dismissal of the lawsuit is the result), this Court's decision of non-justiciability of a state court decision on a federal question leaves that state court judgment intact and unreviewable. *Doremus v. Board of Education,* 342 U.S. 429, 435 (1951). In Cornhusker's case, failure of this Court to review leaves intact the Nebraska Supreme Court's decision of regulation validity and commits Cornhusker to continued compliance with a regulation "putatively illegal" under the fourteenth amendment. Similarly, failure of this Court to review leaves a regulation in force that overrides a natural parent's informed parenting choices, choices that this Court repeatedly has held are protected by the fourteenth amendment. *E.g., Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).

Respondent's misconception of standing requirements is matched by its failure to understand the legal parame-

ters of the law governing independent and adequate state grounds. According to Respondent, when state and federal grounds both are raised but a state court decides a question exclusively on a state ground, then without further inquiry the United States Supreme Court automatically is excluded from considering the federal ground. Respondent's version of independent and adequate state grounds divests this Court of jurisdiction to hear a federal claim whenever a state court refuses to entertain that claim no matter what impact that refusal has on the exercise of the federal right. What Respondent fails to understand is that a ground cannot be independent and adequate if its very resolution is alleged to offend an interest protected by federal law.

In this case Cornhusker at trial and on appeal raised two grounds for relief. The first ground was that under state law the DSS regulation was invalid. The second ground was that, if valid under state law, the regulation was unconstitutional under the fourteenth amendment. As the Nebraska Supreme Court itself noted, Cornhusker properly raised and preserved these federal constitutional claims. Nebraska Supreme Court Order Denying Appellee's Motion to Certify a Federal Question (Juris. Statement, App. 39). Nor does Respondent now allege that somehow, somewhere Cornhusker procedurally did something wrong. There thus is neither allegation nor showing of procedural default on the record before this Court. In the absence of any such default the refusal of the Nebraska Supreme Court to resolve the dispositive federal constitutional ground (after resolving the state ground against Cornhusker) offends both Cornhusker's right to due process of law and the Supremacy Clause.

The impact on Cornhusker is dramatic. In denying Cornhusker's motion for rehearing the Nebraska Supreme Court entered judgment for the DSS. Once the mandate issued the decision became final. Under Nebraska law, the Nebraska Supreme Court now has no power to amend the mandate. *State Bank v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929). Without redress by this Court, Cornhusker

loses on the merits of its fourteenth amendment claims properly raised and preserved without any court ever once considering the merits of the claims.

What remains to a litigant situated such as Cornhusker are options either unavailable or, if available, so burdensome that they offend either the due process clause or Supremacy Clause of the Constitution of the United States. An evaluation of the consequences of Nebraska procedure makes this clear.

1. Cornhusker may not bring a second lawsuit to raise anew its federal constitutional claims because it is barred by the decision in this case even though the merits of its federal claims never were considered. Nor could Cornhusker in the first instance have resolved the problem now facing it by separating out the state and federal claims in two lawsuits. Nebraska law requires that all claims arising out of the same fact transactions be joined in one action. *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W. 2d 678 (1976); *Knapp v. City of Omaha*, 172 Neb. 78, 108 N.W. 2d 419 (1961). Thus under Nebraska law failure to raise the federal claim would have had a preclusive effect on Cornhusker's ever bringing the claim and actually bringing the federal claim has the same preclusive effect.

2. Even if Nebraska law permitted Cornhusker to bring a second lawsuit to raise its federal ground after appeal to a Nebraska Supreme Court that reviewed only the state ground, surely there is an unconstitutional burden on the exercise of a federal right when state procedure routinely requires the expense and delay of two trials before an alternative federal ground is considered and resolved. In cases such as Cornhusker's, where the resolution of the federal right is contingent on the resolution of the state right, it necessarily is the federal right that is relegated to the second trial. In cases where alternative state and federal grounds independently are raised in support of a decision, a state court not surprisingly will consider first the state ground. Again, then, it is the federal right that is relegated to the second trial.

3. If the Nebraska Supreme Court had treated Cornhusker's federal constitutional claim as cognizable but remanded for the trial judge first to entertain it, then Cornhusker contends that such action violates due process and under the Supremacy Clause is an undue burden on the exercise of a federal right. *See, e.g., Reece v. Georgia,* 350 U.S. 85 (1955) (due process violation in state procedure); *Staub v. Baxley,* 355 U.S. 313, 319-20 (1958) (application of state rule leads to "arid ritual of meaningless form"); *Wright v. Georgia,* 373 U.S. 284 (1963) (state may not require redundant repetition of point already made clear). Cornhusker recognizes that the United States Supreme Court frequently remands to afford a lower court an opportunity first to consider even a pure question of law. There are significant differences between the consequences of such docket management by this Court and that of the Nebraska Supreme Court, however.

First, the Nebraska appellate procedure unduly burdens the exercise of a federal right because, as described above, the rule impacts disproportionately on the exercise of that right: it is the federal ground that always will be relegated to consideration only on remand and it is the litigant claiming under the federal right who always will be put to the choice of paying twice to get a claim heard once. Second, since most, now all, of this Court's docket is discretionary, a remand often means that this Court need never resolve the question originally put before it. This Court thus may assure that a litigant obtains court review in an appellate court while at the same time absolutely freeing its docket to decide other pressing issues of national concern.

The Nebraska Supreme Court, by contrast, has a mandatory jurisdiction over all appeals. If it remands a case for a court (trial, not appellate) to consider a pure question of law, it can never foreclose litigants from returning that case to the Nebraska Supreme Court. The remand either will not result in avoidance of the legal question by the court or will so result most likely only because a litigant cannot afford a second appeal.

In the first situation (where the case returns on re-appeal) the Nebraska Supreme Court's remand of a pure legal question (over which it must exercise independent judgment on appeal) offends due process protections because it puts litigants to significant additional expense and delay only to achieve a trial decision with no controlling weight on the Nebraska Supreme Court once the case returns to it. A remand by the Nebraska Supreme Court simply defers a decision on the merits for a later decision when the case returns on re-appeal. The decision deferred, moreover, is deferred from a time when the record and allegations before the court are fresh to a time on re-appeal when the court will have to refamiliarize itself with the record and arguments in the case. While Cornhusker recognizes that this Court is not concerned with a state supreme court's election to cause itself duplicative work and increased time devoted to resolving issues on appeal, Cornhusker urges that this Court should be concerned when the procedure undoubtedly puts heavy costs and delay on litigants with no effective efficiency returns achieved on the other side of the ledger.

In the second situation (where the losing litigant cannot afford a re-appeal), the Nebraska Supreme Court does avoid the obligation of review. It does so, however, through an appellate procedure so time-consuming and costly as to exclude some litigants from being able to fully and fairly air their claims. When entry to effective appellate review is a ticket many cannot afford, then a state appellate procedure must show more systemic benefit than can Nebraska's if it is to withstand a due process challenge grounded in the denial of effective access to the courts.

A case such as Cornhusker's shows in stark terms the burden imposed by Nebraska appellate procedure. Cornhusker is a nonprofit charitable corporation deriving the bulk of its operating funds from private contributions. By contrast, Respondent State of Nebraska can afford to litigate the case forever. The State of Nebraska through its courts thus establishes an appellate procedure that im-

pacts heavily on the poor—and on virtually anyone who sues the State of Nebraska for injury it allegedly caused.

As applied to the Cornhusker appeal, moreover, a remand for trial judge determination of a pure legal question is particularly eggregious as it means a duplicative and costly second trial to resolve the federal claim. The judge who heard the original trial involving Cornhusker and DSS is now a judge of the Nebraska Supreme Court. A remand in this case necessarily must be entertained by a different judge. There is no statute or rule in Nebraska that permits a trial judge on remand to decide a case de novo on a record established at a trial over which he did not preside. Nor could Cornhusker find a reported case in which a trial court exercised such authority. Even if the authority existed, the one benefit accruing to an appellate court—a remand to a judge familiar with the case who heard the evidence first-hand and had the opportunity to evaluate witness credibility—is gone. A Nebraska Supreme Court that already has read and considered the appellate record and arguments of counsel is in a much better position to decide than is a trial judge who has now to familiarize himself with the case for the first time. As applied in the particular circumstances, then, a remand by the Nebraska Supreme Court offends due process and unduly burdens Cornhusker's exercise of its rights under the Supremacy Clause.

The refusal of the Nebraska Supreme Court to consider Cornhusker's dispositive federal claim is a remarkable but routine appellate practice by that court. The entry of judgment by that court without even a remand—however burdensome that remand—also is remarkable and, at least until September 23, 1988, was routine appellate practice by that court.

In preparing to meet a potential procedural default argument never made by Respondent, Cornhusker attempted to uncover any existing Nebraska law on remands by the Nebraska Supreme Court to a trial court for consideration of pure legal questions not considered originally by the trial court but dispositive once the Nebraska Su-

preme Court reversed on other grounds. The Westlaw database for Nebraska cases was checked through 1944 (the last date for which Nebraska cases are included in the database). The database involved more than 2800 cases (not including those cases remanded for computation of interest on judgments); every case using the word "remand" was pulled up and reviewed. All but 15 cases involved a remand for new trial after Nebraska Supreme Court reversal of the trial verdict.[1] Of these 15 cases, not one was remanded for trial court consideration of a pure legal question in any context.[2]

With the above history, it is difficult to explain the actions and rationale of the Nebraska Supreme Court in another case involving Cornhusker that just was decided by the Nebraska Supreme Court. *Cornhusker Christian Childrens Home v. Dep't of Social Services,* 229 Neb. 837, — N.W. 2d — (decided on September 23, 1988 and hereinafter cited as Cornhusker II). As in this case, in Cornhusker II Cornhusker litigated claims based on state and federal constitutional grounds. As in this case, in Cornhusker

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[1]Those 15 cases are: *State v. Jackson,* 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Lofquest,* 223 Neb. 87, 388 N.W.2d 115 (1986); *Younkin v. Younkin,* 221 Neb. 134, 375 N.W.2d 894 (1985); *State v. Williams,* 220 Neb. 415, 370 N.W.2d 150 (1985); *State v. Malek,* 219 Neb. 680, 365 N.W.2d 475 (1985); *State v. Williams,* 218 Neb. 618, 358 N.W.2d 195 (1984); *State v. Waterman,* 215 Neb. 768, 340 N.W.2d 438 (1983); *State v. Steinmark,* 201 Neb. 200, 266 N.W.2d 751 (1978); *State v. Ernest,* 200 Neb. 615, 264 N.W.2d 677 (1978); *State v. Svoboda,* 199 Neb. 452, 259 N.W.2d 609 (1977); *State v. Ford,* 198 Neb. 376, 252 N.W.2d 643 (1977); *State v. Virgilito,* 187 Neb. 328, 190 N.W.2d 781 (1971); *State v. Fugate,* 180 Neb. 701, 144 N.W.2d 412 (1966); *Sioux City Bridge Co. v. Dakota County,* 110 Neb. 597, 194 N.W. 729 (1923).

[2]All of the cases were remanded for an evidentiary hearing; in all but one the Supreme Court decided that the district court erred in failing to grant a requested evidentiary hearing in the first place. The final case, *Sioux City Bridge Co. v. Dakota County, supra,* was one that was tried on the wrong legal theory. In the exercise of its equity jurisdiction the court permitted a remand so that evidence might be admitted relevant to the theory on which the case should have been tried.

II the trial decision was rendered by a judge no longer sitting on the trial court. As in this case, in Cornhusker II the trial decision was in favor of Cornhusker on the state ground. As in this case, in Cornhusker II the federal ground was not directly decided. As in this case, in Cornhusker II both state and federal grounds were raised on appeal to the Nebraska Supreme Court. As in this case, in Cornhusker II the Nebraska Supreme Court reversed on the state ground. As in this case, in Cornhusker II the Nebraska Supreme Court refused to consider the federal ground also raised. As in this case, in Cornhusker II the federal ground involved a pure legal question on a fully developed record. But unlike this case, and without even a motion by Cornhusker (and notwithstanding Nebraska appellate procedure since 1944), in Cornhusker II the Nebraska Supreme Court did not enter judgment but instead remanded the matter to the district court for further proceedings. *Id* at 842.

Cornhusker is well aware that the litigational history of Cornhusker II colors its ability to succeed on appeal in the case now before this Court. Cornhusker has moved for rehearing in Cornhusker II and is requesting either that the Nebraska Supreme Court decide the federal constitutional question itself or that it stay further state court proceedings pending this appeal. (The reasons to be argued to the Nebraska Supreme Court are the ones argued to this Court in this Reply Brief: in the litigational context of both Cornhusker cases a remand is unconstitutional.) Cornhusker has difficulty explaining why, when explicitly asked in this case, the Nebraska Supreme Court would refuse any consideration of a dispositive federal question, and then, after Cornhusker proceeded to the expense and effort of this appeal, why the Nebraska Supreme Court would change its procedural tack in a second case involving both the same procedural posture and the same litigants.

Cornhusker continues to urge this Court both to cure the unconstitutional Nebraska procedure and to decide the substantive merits of its claims. A holding by this Court

that Nebraska appellate procedure is unconstitutional will resolve the identical procedural question sitting in Cornhusker II and permit Cornhusker to proceed to the substantive federal constitutional merits before the Nebraska Supreme Court in Cornhusker II. A holding on the substantive merits by this Court would permit Cornhusker expeditious resolution of its federal constitutional claims here. The actual and projected litigation expenses are fast becoming prohibitive. Cornhusker did everything possible to get the Nebraska Supreme Court to consider its federal constitutional claims before appealing to this Court. A remand now to allow the Nebraska Supreme Court finally to fulfill its constitutional responsibilities in a federalist system is a bonus to a recalcitrant court and an additional, costly, and time-consuming burden to a litigant which not only did everything right but which already suffers from prolonged submission to a "putatively illegal" regulation. Cornhusker thus urges this Court to take the Nebraska Supreme Court at its word and decide the federal question the Nebraska Supreme Court repeatedly and explicitly refused to consider.

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CONCLUSION

For these reasons, and those set forth in the Jurisdictional Statement, Cornhusker urges this Court to note probable jurisdiction of this appeal.

Respectfully submitted,

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